

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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ASHENAFI G. ABERHA,

Plaintiff,

v.

DIRECTOR NEVADA DEPT OF
CORRECTIONS, *et al.*,

Defendants.

Case No. 3:19-cv-00606-MMD-WGC

ORDER

I. SUMMARY

Pro se Plaintiff Ashenafi G. Aberha, who is incarcerated in the custody of the Nevada Department of Corrections (“NDOC”), brings this action under 42 U.S.C. § 1983. Before the Court is United States Magistrate Judge William G. Cobb’s Report and Recommendation (“R&R”), recommending that the Court grant Defendant Eric Delafontaine’s motion for summary judgment (ECF No. 37) and dismiss the Doe Defendant without prejudice.¹ (ECF No. 54.) Plaintiff timely filed an objection (ECF No. 55 (“Objection”)) to the granting of summary judgment, and Defendant responded (ECF No. 57). As further explained below, the Court sustains Plaintiff’s Objection in part and will deny summary judgment.²

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¹The R&R correctly found that Plaintiff failed to timely seek to amend the complaint to add the Doe Defendant as a party. (ECF No. 54 at 4-5.) The Court thus overrules Plaintiff’s objection to the dismissal and adopts the recommendation to dismiss Doe Defendant without prejudice.

²Plaintiff’s Objection challenges Judge Cobb’s evidentiary rulings. The Court declines to address these arguments because the Court rejects Judge Cobb’s recommendation to grant summary judgment in favor of Defendant,

1 **II. BACKGROUND**

2 The Court incorporates by reference and adopts Judge Cobb's recitation of
3 Plaintiff's allegations provided in the R&R. (ECF No. 54 at 1-2.) After the screening of the
4 Complaint, the Court permitted Plaintiff to proceed on a single claim of failure to protect
5 in violation of the Eighth Amendment against Defendant and a Doe officer. (ECF No. 11.)

6 **III. LEGAL STANDARD**

7 **A. Review of Magistrate Judge's Recommendation**

8 This Court "may accept, reject, or modify, in whole or in part, the findings or
9 recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). Where a party
10 timely objects to a magistrate judge's report and recommendation, the Court is required
11 to "make a de novo determination of those portions of the [report and recommendation]
12 to which objection is made." *Id.* The Court's review is thus de novo because Plaintiff filed
13 his Objection. (ECF No. 55.)

14 **B. Summary Judgment Standard**

15 "The purpose of summary judgment is to avoid unnecessary trials when there is no
16 dispute as to the facts before the court." *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18
17 F.3d 1468, 1471 (9th Cir. 1994) (citation omitted). Summary judgment is appropriate
18 when the pleadings, the discovery and disclosure materials on file, and any affidavits
19 "show there is no genuine issue as to any material fact and that the movant is entitled to
20 judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). An issue
21 is "genuine" if there is a sufficient evidentiary basis on which a reasonable factfinder could
22 find for the nonmoving party and a dispute is "material" if it could affect the outcome of
23 the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49
24 (1986). Where reasonable minds could differ on the material facts at issue, however,
25 summary judgment is not appropriate. See *id.* at 250-51. "The amount of evidence
26 necessary to raise a genuine issue of material fact is enough 'to require a jury or judge to
27 resolve the parties' differing versions of the truth at trial.'" *Aydin Corp. v. Loral Corp.*, 718
28 F.2d 897, 902 (9th Cir. 1983) (quoting *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253,

1 288-89 (1968)). In evaluating a summary judgment motion, a court views all facts and
 2 draws all inferences in the light most favorable to the nonmoving party. See *Kaiser*
 3 *Cement Corp. v. Fishbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986) (citation
 4 omitted).

5 The moving party bears the burden of showing that there are no genuine issues of
 6 material fact. See *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). Once
 7 the moving party satisfies Rule 56's requirements, the burden shifts to the party resisting
 8 the motion to "set forth specific facts showing that there is a genuine issue for trial."
 9 *Anderson*, 477 U.S. at 256. The nonmoving party "may not rely on denials in the pleadings
 10 but must produce specific evidence, through affidavits or admissible discovery material,
 11 to show that the dispute exists," *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir.
 12 1991), and "must do more than simply show that there is some metaphysical doubt as to
 13 the material facts." *Orr v. Bank of Am.*, 285 F.3d 764, 783 (9th Cir. 2002) (quoting
 14 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). "The mere
 15 existence of a scintilla of evidence in support of the plaintiff's position will be insufficient[.]"
 16 *Anderson*, 477 U.S. at 252.

17 **IV. DISCUSSION**

18 Judge Cobb recommends granting summary judgment because undisputed
 19 evidence supports Defendant's argument that Plaintiff cannot satisfy the subjective prong
 20 of his claim³—that Defendant was not aware that Plaintiff faced a substantial risk of harm
 21 by keeping Plaintiff in the cell with his cellmate, Booker, who Plaintiff complained later
 22 choked and raped him. (ECF No. 54 at 11-13.) The Court disagrees with the finding that
 23 the facts are undisputed and therefore rejects Judge Cobb's recommendation to grant
 24 summary judgment.

25 In support of his motion, Defendant stated in his declaration that Plaintiff told him

26 ³This subjective prong requires a plaintiff to show that "the official [knew] of and
 27 disregard[ed] an excessive risk to inmate . . . safety; the official must both be aware of
 28 facts from which the inference could be drawn that a substantial risk of serious harm
 exists, and [the official] must also draw the inference." *Farmer v. Brennan*, 511 U.S. 825,
 837 (1994).

1 “it was not working with his cellmate and that they needed to be separated.” (ECF No. 37-
2 1 at 3.) Defendant denied that Plaintiff ever indicated that he “had been sexually assaulted
3 by inmate Booker.” (*Id.*) Judge Cobb found that although Plaintiff argued that Defendant’s
4 declaration is false, he does not offer any evidence to dispute these statements. (ECF
5 No. 54 at 11-12.) However, Plaintiff asserts in his verified Complaint that on September
6 20, 2018, Booker sexually assaulted Plaintiff three times while Plaintiff was in the cell with
7 him, and he reported the first incident to Defendant, but Defendant made fun of Plaintiff.⁴
8 (ECF No. 5 at 4.) Courts must consider a *pro se* party’s contentions offered in motions
9 and pleadings as evidence in his opposition to the motion for summary judgment “where
10 such contentions are based on personal knowledge and set forth facts that would be
11 admissible in evidence, and where [he] attested under penalty of perjury that the contents
12 of the motions or pleadings are true and correct.” *Jones v. Blanas*, 393 F.3d 918, 923 (9th
13 Cir. 2004); *see also Richardson v. Reno Police Dep’t*, Case No. 3:17-cv-00383-MMD-
14 WGC, 2020 WL 907561, at *2 (D. Nev. Feb. 24, 2020) (noting that a *pro se* plaintiff “may
15 rely on his own verified statements to create a factual dispute”). Plaintiff’s Complaint is
16 verified, and he attested to the allegations in his Complaint under penalty of perjury. (ECF
17 No. 5 at 9.) Viewed in the light most favorable to Plaintiff and drawing all reasonable
18 inferences in his favor, Plaintiff’s sworn allegations create a genuine issue of material fact
19 as to whether Defendant was aware of a substantial risk of harm to Plaintiff, from his
20 continued sharing of the cell with Booker. *See Celotex Corp.*, 477 U.S. at 322; *Kaiser*
21 *Cement Corp.*, 793 F.2d at 1103. A rational jury could reasonably find that Defendant
22 knew of a serious risk of harm to Plaintiff because of Plaintiff’s report that Booker had
23 raped him. (ECF No. 5 at 4.) *See Anderson*, 477 U.S. at 248-51.

24 Defendant alternatively argued that he is entitled to qualified immunity based on
25 the same contention that under the particular facts here, he had no notice of any risk of
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27 ⁴Plaintiff also repeated these statements in his Objection—he “reported to
28 Defendant that he had been sexually assaulted and the defendant made fun of him.” (ECF
No. 55 at 2.)

1 harm to Plaintiff.⁵ (ECF No. 37 at 10.) Defendant thus insisted that he did not violate any
 2 clearly established right.⁶ (*Id.* at 11.) However, the Court again finds that the allegations
 3 of Plaintiff's report of rape to Defendant, as alleged in his verified Complaint, creates a
 4 material issue of fact that renders summary judgment on Defendant's qualified immunity
 5 defense inappropriate.

6 **V. CONCLUSION**

7 The Court notes that the parties made several arguments and cited to several
 8 cases not discussed above. The Court has reviewed these arguments and cases and
 9 determines that they do not warrant discussion as they do not affect the outcome of the
 10 issues before the Court.

11 It is therefore ordered that Plaintiff's objection (ECF No. 55) to the Report and
 12 Recommendation of U.S. Magistrate Judge William G. Cobb (ECF No. 54) is sustained
 13 in part and rejected in part.

14 It is further ordered that Defendant's motion for summary judgment (ECF No. 37)
 15 is denied.

16 It is further ordered that the Doe Defendant is dismissed without prejudice.

17 DATED THIS 20th Day of January 2022.



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20 MIRANDA M. DU
CHIEF UNITED STATES DISTRICT JUDGE

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23 ⁵Judge Cobb did not reach Defendant's alternative argument because he found in
 24 favor of Defendant on liability. (ECF No. 54 at 12.)

25 ⁶The Court conducts a two-step inquiry to determine whether Defendant is entitled
 26 to qualified immunity. See *Groves v. City of Reno*, Case No. 3:13-cv-00537-MMD-WGC,
 27 2015 WL 5350099, at *4 (D. Nev. Sept. 14, 2015). First, the Court decides "whether the
 28 facts shown make out a violation of a constitutional right." *Id.* If the Court finds a
 constitutional violation, the Court then decides "whether the constitutional right was
 clearly established as of the date of the alleged misconduct." *Id.* (citations omitted). "The
 Supreme Court has instructed that district judges may use their discretion in deciding
 which qualified immunity prong to address first based on the circumstances of the case
 at issue." *Id.* (citing *Pearson v. Callahan*, 555 U.S. 223 at 232, 236 (2009)). Defendant
 moved for summary judgment on the first prong. (ECF No. 37 at 10-11.)